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SHORT FORM ORDER

INDEX NO.: 0014079/2009
SUBMIT DATE: 3/27/2013
MTN. SEQ.#: 004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 1/16/2013
MOTION NO.: MOT D

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET INVESTMENT LOAN: TRUST, 2005-7,

Plaintiff,

-against-

JONATHAN BOES, AMERICAN EXPRESS TRAVEL RELATED SERVICES INC., CAPITAL ONE BANK USA NA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR GREENPOINT MORTGAGE FUNDING, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, GEORGE BOES, STEPHANIE MUHR, TARAN BOES,

Defendants.

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GROSS POLOWY ORLANS, LLC
By: John J. Ricciardi, Esq.
Attys. for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, NY 14228

MACCO & STERN LLP
By Charles Wallshein, Esq.
Attorneys for Defendant Jonathan Boes
135 Pinelawn Road, Suite 120 South
Melville, NY 11747

Upon the following papers numbered 1 to 83 read on this application for an order vacating the prior order of the Court dated December 19, 2012, and for leave to file a late Answer; Notice of Motion/Order to Show Cause and supporting papers 1-40; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 41-68; Replying Affidavits and supporting papers 69-83; Other ____; it is

ORDERED that so much of the application of the defendant, Jonathan Boes, for an order treating his motion brought by Order to Show Cause dated January 2, 2013, as a motion to vacate the order of the Court substituting an affidavit of merit and amount due, nunc pro tunc, validating the Order of Reference and ratifying the Judgment of Foreclosure and Sale, dated December 19, 2012, is granted; and it is further

ORDERED that so much of the motion of the defendant, Jonathan Boes, that seeks to vacate the prior Order of the Court dated December 19, 2012, substituting an affidavit of merit and amount due, nunc pro tunc, validating the Order of Reference dated December 30, 2009, and ratifying the Judgment of Foreclosure and Sale dated May 26, 2010, is denied; and it is further

ORDERED that so much of the motion of the defendant, Jonathan Boes, that seeks leave to file an Answer to the complaint that was filed on April 13, 2009, pursuant to CPLR §§ 3012 (d) and 3408 is denied.

Unless otherwise indicated, the following facts are taken from the defendant's affidavit submitted in support of the instant motion dated December 5, 2012. Boes borrowed the sum of $396,000.00 in 2005 from an entity named BNC Mortgage. Due to a personal tragedy and the failure of his contracting business, Boes defaulted on that mortgage in October of 2008. Boes attempted to modify his mortgage with a mortgage servicing company named America's Servicing Co. That company informed Boes that it had "bought" Boes' loan from BNC Mortgage. According to Boes, during the loan modification process the servicing of the loan was taken over by Wells Fargo who represented itself to Boes as one and the same with America's Servicing Company.

A temporary loan modification dated August 8, 2008, was executed by Boes and Wells Fargo. The temporary modification added the arrears to the principal balance but the interest rate on the modification remained the same. There was no extension of the term from thirty years to forty years as the defendant was allegedly promised by the initial loan servicer.

Defense counsel's affirmation, rather than Boes' affidavit, claims that after the modification agreement was executed, Boes commenced making payments but the payments were returned to him. Defense counsel claims that Boes contacted the servicing agent but did not get an answer as to why the payments were being returned.

According to Boes, the temporary agreement was never made permanent as the servicer claimed it needed further documents. Boes claims that the servicer continually lost and misplaced his documents. Boes attests he attended all the mandatory settlement conferences. Nevertheless, his efforts to modify the loan were unsuccessful. The defendant filed for Chapter 7 bankruptcy on or about August 5, 2010.

The plaintiff, US Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-7 ["the plaintiff"], commenced the action to foreclose the mortgage in April of 2009. The defendant acknowledges that he was served with the summons and complaint but failed to answer. The plaintiff's opposition papers assert that on July 20, 2009, the Foreclosure Department of the Suffolk County Supreme Court released the matter, the mandatory settlement conference having been held on July 16, 2009. On September 11, 2009, the plaintiff moved by notice of motion for an Order of Reference. The Reference was granted on December 30, 2009. The defendant was served with the Notice of Motion for an Order of Reference but did not oppose the motion. On or about February 19, 2010, the plaintiff moved for a Judgment of Foreclosure and Sale. Again, the defendant was served with the motion but did not oppose the application. The Judgment of Foreclosure and Sale was granted on May 26, 2010.

There is no dispute that a foreclosure sale of the subject property was scheduled for August 10, 2010. Boes was served with notice of the sale on July 29, 2010. On August 5, 2010, Boes filed for Chapter

7 Bankruptcy thereby staying the scheduled sale. On August 23, 2010, the plaintiff moved to be relieved from the automatic stay in the Chapter 7 proceeding. The defendant was discharged on November 9, 2010.

Upon being served in late September of 2012 with the plaintiff's motion to ratify the previously entered Order of Reference and to validate the Judgment of Foreclosure and Sale, the defendant retained counsel. On October 19, 2012, newly retained defense counsel filed a Notice of Appearance and attempted to interpose an Answer to the April 2009 complaint. The proposed Answer contained various affirmative defenses, principal among them that the plaintiff lacked standing to maintain this foreclosure action. The plaintiff rejected the Answer on October 31, 2012.

The defendant did not oppose the plaintiff's motion, returnable on October 24, 2012, which also sought to substitute the affidavits previously submitted in order to be in compliance with the regulations adopted by the Office of the Chief Administrator in October of 2010, nunc pro tunc. Thus, the Order granting the relief requested including ratification of the Order of Reference, and validation of the Judgment of Foreclosure and Sale was entered on default on December 19, 2012. On January 2, 2013, the defendant made the within motion by way of Order to Show Cause for, inter alia, an order vacating the December 19th Order and for leave to serve a late Answer to the Complaint.

According to the affidavit of a Vice President for Wells Fargo Bank, N.A. d/b/a America's Servicing Company dated February 15, 2013 ["the bank affidavit"], America's Servicing Company is the servicing part of Wells Fargo. On May 13, 2005, in order to refinance a pre-existing loan, Boes obtained a $396,000.00 loan from BNC Mortgage, Inc. Pursuant to a Trust Agreement filed with the United States Securities and Exchange Commission, on July 1, 2005, the defendant's loan was "transfer[red], assign[ed], set[ ] over and otherwise convey[ed] to the Trust." The affidavit claims that 1) the Trust is the current holder of the Note and Mortgage and has been at all times since the transfer under the Trust Agreement, 2) Wells Fargo's regularly maintained business records reflect that the Note with an allonge specifically endorsed to the Trust and the Mortgage were delivered to the Trust through its custodian, 3) the transfer took place prior to the commencement of the action on April 13, 2009, and 4) the transfer was subsequently memorialized in a written assignment dated March 25, 2009, and recorded on April 15, 2009.

The bank affidavit confirms that Wells Fargo, as servicer for the Trust, modified the defendant's refinanced loan in August of 2008, but no payments were made by the borrower after the loan was modified. The bank affidavit gave the default date as October 1, 2008. The bank affidavit asserts that the plaintiff sent the defendant notice of his default and provided opportunities to cure, but to date, defendant has failed to do so.

In support of his motion to vacate the Order ratifying the Reference and validating the Judgment of Foreclosure, defense counsel argues that a defendant proceeding *pro se* in a foreclosure proceeding, like the defendant here, doesn't understand the intricacies of civil procedure and in many cases believes that appearing in and participating in the settlement conferences or a modification of their loan constitutes an "appearance" in the action, thereby precluding a judgment being taken against him/her in default. While defendant's attorney makes that argument, there is nothing in Mr. Boes' four page affidavit that supports the contention that he reasonably believed it was not necessary for him to Answer the complaint, respond to the Order of Reference, the motion for a Judgment of Foreclosure and Sale, or the most recent motion for an order substituting an affidavit of merit and amount due, nunc pro tunc, validating the Order of Reference and ratifying the Judgment of Foreclosure.

While the defendant expresses his past and continued desire to modify the existing mortgage, after the execution of the temporary loan modification in August of 2008, Boes admits that the plaintiff repeatedly expressed dissatisfaction with whatever documents Boes was providing to the servicer. Nowhere in the defendant's affidavit does he assert that he believed his actions excused his failure to answer the complaint or respond to the motions for a reference or for a judgment of foreclosure, distinguishing this case from ***HSBC Bank USA, N.A. as Trustee v. Cayo***, relied upon by the defendant (***HSBC Bank USA, N.A. as Trustee v. Cayo***, 34 Misc.3d 850, 852, 934 N.Y.S.2d 792 [Sup. Ct. Kings 2011]). In fact, in response to the original judgment of foreclosure, Boes filed a bankruptcy petition in the summer of 2010 resulting in a stay, albeit temporarily, of the sale of the property at a public auction.

Although the Boes affidavit states that the defendant attended all the mandatory settlement conferences in good faith, according to the court's case management system, the only settlement conference was on July 16, 2009, and the defendant failed to appear. Thus, the matter was referred to the IAS part on July 20, 2009, for the plaintiff to proceed with an order of reference.

Rather than there being a good faith belief in settlement on the part of the defendant, supported by substantial evidence, (*see* ***Armstrong Trading Ltd. v. MBM Enterprises***, 29 A.D.3d 835, 815 N.Y.S.2d 689 [2d Dept. 2006]), the defendant had every reason to believe that the mortgagee was moving forward with the foreclosure (*see* ***Bank of New York v. Jayaswal,*** 33 Misc.3d 1214(A), 941 N.Y.S.2d 536 [Suffolk Sup. Ct. 2011] [citations omitted]).

CPLR 5015 (a) (1) entitled, "Relief from judgment or order" requires that to vacate a default judgment the defaulting party must demonstrate an excusable default and a meritorious defense (***Ryan v. Breezy Point Coop. Inc.***, 76 A.D.3d 523, 524, 904 N.Y.S.2d 910 (2d Dept. 2010]; *see also* ***Hageman v. Home Depot U.S.A., Inc.***, 25 A.D.3d 760, 761, 808 N.Y.S.2d 763, 764 [2d Dept. 2006]).

Likewise, to succeed on a motion for leave to file and serve a late answer pursuant to **CPLR** 3012 (d) "a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" (***Community Preserv. Corp. V. Bridgewater Condominiums, LLC***, 89 A.D.3d 784, 785, 932 N.Y.S.2d 378 [2d Dept. 2011]). The determination of what constitutes a reasonable excuse for filing an untimely answer lies within the sound discretion of the Supreme Court (***Maspeth Fed. Savings and Loan Ass'n.***, 77 A.D.3d 889, 909 N.Y.S.2d 403 [2d Dept. 2010]). The determination is based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*see* ***Orwell Bldg. Corp. v. Bessaha***, 5 A.D.3d 573, 773 N.Y.S.2d 126 [2d Dept. 2004]).

A good faith belief in settlement negotiations will supply a reasonable excuse for failure to timely answer (***Armstrong Trading, Ltd. v. MBM Enters.***, 29 A.D.3d 835, 836, 815 N.Y.S.2d 689 [2d Dept. 2006]). However, the only support for the argument that the defendant had a good faith belief that settlement negotiations precluded his default were the conclusory assertions in his attorney's affirmation.

The summons contains the mandatory language of **RPAPL** 1303 that if the defendant does not respond to the summons and complaint by serving a copy of the answer on the attorney for the mortgage company and filing a copy with the court, a default judgment may be entered and [the defendant] can lose [his] home. While it is understandable that the defendant desired a loan modification and attempted to obtain one, it became clear within one month of the modification agreement that the defendant defaulted

and that the plaintiff was proceeding with the foreclosure. A delay well in excess of three years in failing to apply to the court to be relieved of a default in answering a complaint is not excusable under the circumstances here (*see* ***Deutsche Bank Nat. Trust Co. v. Gutierrez,*** 102 A.D.3d 825, 958 N.Y.S.2d 472 [2d Dept. 2013]).

The cases relied upon by the defendant do not lend support to his position and are in any event distinguishable. In ***Wells Fargo Bank, N.A. v. Chateau***, the defendant sought leave to file and serve a late Answer at a time when, in the court's words, the action was "still in its infancy". 36 Misc.3d 280, 282, 947 N.Y.S.2d 773 [Sup. Ct. Queens 2012]). When the defendant moved for leave to file a late answer, the plaintiff had not yet submitted an order of reference. Here, the defendant filed for Chapter 7 bankruptcy almost two years ago on the eve of a scheduled sale at auction, both the order of reference and the judgment of foreclosure and sale having been obtained.

In addition, the defendant in ***Chateau,*** *supra,* reasonably believed the action was stayed because the record demonstrated that his counsel assured him that settlement negotiations were occurring (*id.* at 281-282). There is no such evidence here.

Likewise, in ***HSBC Bank USA, N.A. as Trustee v. Cayo*** cited by the defendant, no judgment of foreclosure had been entered that would have to be vacated before granting the defendant leave to file and serve a late answer (34 Misc.3d 850, 852, 934 N.Y.S.2d 792 [Sup. Ct. Kings 2011]; *compare* ***Onewest Bank, FBB v. Berry***, 25 Misc.3d 1218[A], 901 N.Y.S.2d 908 [Sup. Ct. Suffolk 2009] [Whelan, J.]).

The argument that the judgment should be vacated pursuant to **CPLR** 5015 (a) (3) because procured through fraud is raised for the first time in the Reply affirmation and has not been considered (***Smith v. County of Suffolk***, 61 A.D.3d 743, 876 N.Y.S.2d 658 [2d Dept. 2009]). Even if the argument had been properly raised, because the moving defendant has failed to advance specific and substantiated allegations that the plaintiff or its agents engaged in acts constituting extrinsic fraud, that is, wrongful acts of trickery or deceit which allegedly induced the moving defendant into defaulting or otherwise wrongfully deterred him from litigating the plaintiff's claims, vacatur of a default is not warranted (*see* ***Bank of New York v Stradford***, 55 A.D.3d 765, 869 N.Y.S.2d 554 [2d Dept. 2008]; ***Wells Fargo v Lizenberg***, 50 A.D.3d 674, 853 N.Y.S.2d 912 [2d Dept. 2008]; ***Aames Capital Corp. v Davidsohn***, 24 A.D.3d 474, 808 N.Y.S.2d 229 [2d Dept. 2005]).

As the Court concludes that the defendant does not have a reasonable excuse for defaulting in the action, it is unnecessary to address whether he has a meritorious defense (***Deutsche Bank Nat. Trust Co. v. Pietranico***, 102 A.D.3d 724, 957 N.Y.S.2d 868 [2d Dept. 2013], citing ***U.S. Bank N.A. v. Stewart***, 97 A.D.3d 740, 948 N.Y.S.2d 411 [2d Dept. 2012]; ***Reich v. Redley***, 96 A.D.3d 1038, 947 N.Y.S.2d 564 [2d Dept. 2012]).

DATED: 19 June 2013

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION